

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

ORLANDO MALPICA-GARCÍA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 08-2055 (JAF)

(Crim. No. 03-081)

**OPINION AND ORDER**

Petitioner, Orlando Malpica-García, brings this pro-se petition for relief from a federal court conviction pursuant to 28 U.S.C. § 2255. Docket No. 1. Respondent, the United States of America, opposes, Docket No. 9, and Petitioner replies, Docket No. 10. Petitioner moves for an evidentiary hearing pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings. Docket No. 12.

**I.**

**Factual and Procedural History**

On March 13, 2003, a federal grand jury indicted Petitioner on four criminal counts. Case No. 03-081, Docket No. 2. The court appointed Juan Álvarez Cobián as his attorney on March 21, 2003. Case No. 03-081, Docket No. 57. On July 3, 2003, the government sent Álvarez Cobián a plea offer for Petitioner of twenty years, expiring on July 28, 2003. Docket No. 1, Ex. B. Prior to the plea offer's expiration, on July 17, 2003, a federal grand jury issued a superseding indictment charging Petitioner and twenty six other

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1 individuals with conspiracy to possess controlled substances with  
2 intent to distribute; conspiracy to use, carry, or possess a firearm;  
3 and distribution of controlled substances near a school or public  
4 housing. Case No. 03-081, Docket No. 149.

5 On January 26, 2004, Petitioner moved to change his attorney.  
6 Case No. 03-081, Docket No. 282. Petitioner alleges in his sworn  
7 affidavit that in early May 2004, Álvarez Cobián told him that the  
8 government had made a twenty-year plea offer, and Petitioner asked  
9 him if he could get a lower offer. Docket No. 1, Ex. A. Petitioner  
10 claims that Álvarez Cobián said he would continue negotiations. Id.

11 On May 21, 2004, Álvarez Cobián sent Petitioner a letter stating  
12 that he had received a plea offer of fifteen years, which Álvarez  
13 Cobián had rejected, and that the government had recommended he make  
14 a counteroffer of twelve years. Docket No. 1, Ex. C. Petitioner  
15 alleges in his affidavit that on June 14, 2004, he told Álvarez  
16 Cobián that he would accept a twelve-year plea offer. Docket No. 1,  
17 Ex. A. He further states that he asked Álvarez Cobián to withdraw as  
18 counsel and Álvarez Cobián agreed. Id.

19 On June 30, 2004, Petitioner again moved to change his attorney,  
20 alleging that Álvarez Cobián had not sufficiently discussed the case  
21 with Petitioner or provided discovery materials. Case No. 03-081,  
22 Docket No. 533. The court held a change-of-attorney hearing on  
23 July 15, 2004. Case No. 03-081, Docket No. 1050. At the hearing,  
24 Álvarez Cobián stated that he had received plea offers from the

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1 government and that Petitioner had informed him that Petitioner would  
2 not accept offers of fifteen or twelve years. Id. In addition, the  
3 court discussed Petitioner's potential sentence. Id. The Assistant  
4 United States Attorney ("AUSA") stated that if convicted at trial  
5 Petitioner could face a minimum of twenty years and, at most, a life  
6 sentence, depending on his criminal record. Id. Petitioner did not  
7 offer any response to these statements. Id. There is no evidence that  
8 the government made any plea offers after this hearing. On July 19,  
9 2004, the court denied the motion for change of attorney. Case  
10 No. 03-081, Docket No. 580.

11 On July 1, 2005, following a six-day trial, a jury found  
12 Petitioner guilty of the two conspiracy counts. Case No. 03-081,  
13 Docket No. 954. On October 14, 2005, the court sentenced Petitioner  
14 to concurrent terms of imprisonment of 385 months and 240 months and  
15 five years of supervised release. Case No. 03-081, Docket No. 1017.

16 Petitioner appealed, and on June 6, 2007, the First Circuit  
17 affirmed his sentence. United States v. Malpica-García, 489 F.3d 393  
18 (1st Cir. 2007). The Supreme Court denied certiorari on October 1,  
19 2007. United States v. Malpica-García, 128 S. Ct. 316 (2007).

20 Petitioner moved for § 2255 relief on September 17, 2008.  
21 Docket No. 1. Respondent opposed on November 28, 2008. Docket No. 9.  
22 On March 9, 2009, Petitioner replied, Docket No. 10, and moved for an  
23 evidentiary hearing, Docket No. 12.



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1       Petitioner alleges that his counsel wrongly informed him of the  
2       maximum sentence he faced if convicted at trial, failed to advise him  
3       regarding the desirability of accepting a plea offer rather than  
4       facing trial, and unilaterally rejected a plea offer. Id. Respondent  
5       argues that Petitioner's allegations are foreclosed by the record,  
6       specifically, the transcript of the change-of-attorney hearing.  
7       Docket No. 9 (citing Case No. 03-081, Docket No. 1050).

8       To establish ineffective assistance of counsel, a petitioner  
9       must show both that his counsel's performance was deficient and that  
10      he suffered prejudice as a result of the deficiency. Strickland v.  
11      Washington, 466 U.S. 668, 686-96 (1984). To show deficient  
12      performance, a petitioner must "establish that counsel was not acting  
13      within the broad norms of professional competence." Owens v. United  
14      States, 483 F.3d 48, 57 (1st Cir. 2007) (citing Strickland, 466 U.S.  
15      at 687-91). To show prejudice, a petitioner must demonstrate that  
16      "there is a reasonable probability that, but for counsel's  
17      unprofessional error, the result of the proceedings would have been  
18      different." Strickland, 466 U.S. at 694.

19      "[T]he decision whether to plead guilty or contest a criminal  
20      charge is ordinarily the most important single decision in a criminal  
21      case . . . ." United States v. Gordon, 156 F.3d 376, 380 (2d Cir.  
22      1998) (quoting Boria v. Keane, 99 F.3d 492, 496-97 (2d Cir. 1996))  
23      (internal quotation marks omitted). A defense attorney has a duty to  
24      fully advise his or her client regarding whether a plea offer is

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1 desirable; failure to do so may constitute ineffective assistance.  
2 See United States v. González-Vázquez, 219 F.3d 37, 41 (1st Cir.  
3 2000) (quoting Boria, 99 F.3d at 496). "Knowledge of the comparative  
4 sentence exposure between standing trial and accepting a plea offer  
5 will often be crucial to the decision whether to plead guilty."  
6 United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). Moreover, an  
7 attorney's failure to communicate a plea offer altogether may also  
8 constitute ineffective assistance. See United States v. Rodríguez  
9 Rodríguez, 929 F.2d 747, 753 (1st Cir. 1991). The decision to accept  
10 or reject a plea offer is ultimately a decision to be made by the  
11 client, not the attorney. See González-Vázquez, 219 F.3d at 41  
12 (quoting Boria, 99 F.3d at 496-97). A petitioner may show prejudice  
13 where an attorney fails to communicate a plea offer or provide advice  
14 during plea bargaining. See, e.g., Rodríguez Rodríguez, 929 F.2d at  
15 753 n.1 ("[T]he fact that a defendant, after rejecting a guilty plea,  
16 still receives all the constitutional protections of trial does not  
17 preclude an attack on sixth amendment grounds if counsel's  
18 performance during plea bargaining fell below the range of competence  
19 demanded of attorneys in criminal cases . . . . Furthermore, the mere  
20 possibility that the district court might have rejected a plea  
21 agreement does not preclude [a defendant] from showing prejudice."  
22 (citations and internal quotation marks omitted)).

23 Petitioner states, in a sworn affidavit, that his counsel told  
24 him he faced around twenty years whether he pled guilty or went to

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1 trial. Docket No. 1, Ex. A. In fact, Petitioner faced a potential  
2 life sentence at trial. Case No. 03-081, Docket No. 1014. Petitioner  
3 also submits a letter indicating that his counsel rejected a plea  
4 offer of fifteen years without first discussing the offer with  
5 Petitioner. Docket No. 1, Ex. C. The statements made by counsel at  
6 the change-of-attorney hearing do not alone foreclose the possibility  
7 that Petitioner's allegations are true. The fact that the AUSA stated  
8 what he thought Petitioner's sentence exposure might be does not  
9 demonstrate that Petitioner was aware of the potential life sentence  
10 during the preceding months when plea discussions were taking place.  
11 See Case No. 03-081, Docket No. 1050. Nor does Álvarez Cobián's  
12 statement that Petitioner had said he would not accept a plea offer  
13 of twelve or fifteen years provide us enough information to determine  
14 whether Petitioner received adequate advice during plea bargaining.  
15 See id. Petitioner indicates that he would have accepted a plea offer  
16 of fifteen or twenty years had he received adequate advice from his  
17 counsel. See Docket No. 1 & Exs. A, B.

18 Petitioner's detailed allegations, if true, present a serious  
19 ineffective-assistance-of-counsel question that would satisfy both  
20 prongs of the Strickland standard. See, e.g., Rodríguez Rodríguez,  
21 929 F.2d at 753. Whether Petitioner received ineffective assistance  
22 of counsel depends upon the determination of facts that are not  
23 apparent from the record. An evidentiary hearing is, therefore,  
24 necessary for the disposition of Petitioner's claim.

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1 **IV.**

2 **Conclusion**

3 For the foregoing reasons, we **GRANT** Petitioner's motion for an  
4 evidentiary hearing, Docket No. 12.

5 **IT IS SO ORDERED.**

6 San Juan, Puerto Rico, this 26<sup>th</sup> day of May, 2009.

7 S/José Antonio Fusté  
8 JOSE ANTONIO FUSTE  
9 Chief U.S. District Judge